

**Cumberland Farms Dairy of New York, Inc. and
Lance Giles, Case 3-CA-9901**

20 May 1983

**SUPPLEMENTAL DECISION AND
ORDER**

**BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER**

On 28 December 1982 Administrative Law Judge Walter J. Alprin issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision¹ in light of the exceptions and brief and has decided to affirm the rulings, findings,² and conclusions³ of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Cumberland Farms Dairy of New York, Inc., Canton, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

¹ In the second sentence of sec. I, A of his Decision, the Administrative Law Judge inadvertently implied that Charging Party Giles began to work on a second job delivering newspapers, after he had begun to work for Respondent. However, the record establishes that Giles began his newspaper delivery job in November 1977, before the February 1978 start of his employment with Respondent.

² Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

³ Member Hunter adopts the Administrative Law Judge's conclusion that the income earned by discriminatee Giles from his newspaper deliveries does not constitute interim earnings. Accordingly, Member Hunter finds it unnecessary to pass on the Administrative Law Judge's discussion of prior Board cases determining the circumstances in which a discriminatee may be disqualified from recovering backpay for failure to report interim earnings.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge: This proceeding involves backpay specifications issued February 26, 1982, and thereafter amended. By Decision and

266 NLRB No. 156

Order issued September 30, 1981,¹ reported at 258 NLRB 900, the National Labor Relations Board directed Cumberland Farms Dairy of New York, Inc., of Canton, Massachusetts, to make whole Lance Giles for his losses resulting from Cumberland's unfair labor practices. Cumberland stipulated it had no objections to said Order, and this proceeding was instituted to determine the disputed amount of backpay due. Hearing was held at Albany, New York, on September 14, 1982. Respondent's unopposed motion to correct the transcript and record, served September 28, 1982, is hereby granted.

The computation and amounts of backpay as set forth in the attached Appendix exclusive of interest are agreed to by the parties. The disagreement lies in whether the claimant made a reasonable attempt to find work during the backpay period, whether he realized any interim earnings during the backpay period from truck farm operations, and whether he should be denied the benefit of the National Labor Relations Act by reason of his failing to report certain income from a secondary employment, which secondary employment had commenced well before and continued beyond the backpay period.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by respective counsel, I make the following:

FINDINGS OF FACT

A. Secondary Employment

The backpay period involved is from June 3, 1980, through July 27, 1981. In 1977, while employed by Respondent, Giles began to work at a second job for 1 to 2 hours per day, delivering bundles of newspapers for the Schenectady Gazette by dropping them at assigned locations between 2 and 4 o'clock in the morning. By January 1980 he was paid \$115 per pay period, plus \$15 for those instances when the size of supplements increased the load, plus a year-end bonus. By the end of 1981, his pay had increased to \$152 per pay period. Total compensation from the source was \$4,454 in 1980 and \$7,739 in 1981. Giles continued this second employment after he was rehired by Cumberland in July.

A review of income tax returns and payment statements, and admissions by Giles, proves that Giles shifted the payment for this work to his wife's name in order to "avoid trouble" in collecting unemployment payments, and has never reported this income to Federal or state authorities for income tax purposes before, during, or after the backpay period.

There is no doubt that income from a second employment begun prior to and continued into the backpay period is not treated as interim earnings to reduce the amount of backpay due to make whole a discriminatee.² Therefore, the income earned by Giles from his newspaper deliveries is not to be deducted from backpay as interim earnings.³

¹ All dates are in 1981 unless otherwise specified.

² *3 States Trucking Inc.*, 252 NLRB 1088, 1097 (1980).

³ During the course of the hearing Giles was given to understand by the Administrative Law Judge that though his failure to report this

Continued

Respondent argues that by reasons of Giles' possible fraud on the unemployment benefit authorities and his evasion of taxes on his second employment income, he should not be the beneficiary of Board action, citing in support *Great Plains Beef Co.*, 255 NLRB 1410 (1981). In that decision the Board held that it would not act for the benefit of a discriminatee who had not only made continuing efforts to conceal interim earnings from both Respondent and the General Counsel but also gave testimony which was palpably incredible. The matter at hand is fully distinguishable in that Giles' second income is not an issue to be considered by the General Counsel or by the Board and thus the introduction or nonintroduction of such evidence is immaterial. Even if this income were treated as interim earnings, Giles would still not be disqualified from recovering backpay. Giles did not attempt to hide this source of income from the General Counsel or from counsel for Respondent. Giles provided Respondent full documentation, before the weekend prior to the hearing, of both the income and of the failure to report it for tax and unemployment benefits purposes. The Board has recently reaffirmed the employee's right to backpay under similar circumstances in *Big Three Gas & Equipment Co.*, 263 NLRB 1189 (1982), and even the partial dissent therein by Member Zimmerman would not preclude the relief as Giles neither lied nor evaded questions during the hearing to deliberately conceal his earnings.

B. Farm Income

In addition to income from newspaper delivery Giles was in a position to realize funds during the backpay period from truck farming. Giles' interest in farming began during 1980, and he decided to farm commercially during the 1981 growing season. He formed a partnership with his mother wherein she would contribute capital for a 75-percent share and he would contribute his labor for a 25-percent share. In 1981 capital contribution was almost \$20,000 for depreciable machinery, and over \$12,000 was spent on other expenditures, while income received was only \$2,750. The cash income was used to defray expenses. Giles received neither salary nor draw from the partnership, and reported 25 percent of its net loss as a negative item on his 1981 income tax returns. The farm operations did not interfere with his search for employment, and he continued the farm operations after being rehired by Cumberland in July.

The issues as to farm earnings are whether they constitute income for backpay purposes or otherwise. The capital requirements of the operation permit the partnership to claim the benefits of depreciation in computing income or loss. There being no impediment to Giles doing business in a partnership form he is entitled to compute his net earnings or loss based on his partnership interest. The farm partnership operations having resulted in loss rather than gain, there is no income to Giles to offset against backpay.

income for tax purposes was not, in the judge's opinion, germane to the issues of this case, neither the Board nor the Judge countenanced tax evasion, and that it would behoove him to take corrective action.

C. Attempts To Find Work

Giles' undisputed testimony is that from the time of his being terminated by Cumberland until they rehired him almost 14 months later he attempted to locate suitable employment by visiting one prospective employer, by phoning all the other prospective employers in the area each week, by responding to pertinent advertisements in the local newspaper, by calling fellow drivers for leads, and by the required weekly checking with the state unemployment office through which he received benefits. Respondent, by producing some newspaper advertisement of help wanted in the pertinent field and by allegations that the employee's admission of failure to report certain taxable income renders all testimony invalid, does not meet the burden of proof imposed in backpay cases. "While the evidence may leave a question as to whether [the discriminatee] could have been more diligent in seeking other employment, the highest standard of diligence is not required⁴ Rather, the individual is held 'only to reasonable exertions in this regard.' Finally, it is well settled that any uncertainty in the evidence is to be resolved against Respondent as the wrongdoer."⁴ Though the discriminatee's testimony here is not directly supported by independent evidence⁵ it is sufficient, unopposed, to establish an attempt to find interim employment. While the witness' general veracity is put in question by his evasion of taxes, there is nothing against which his testimony regarding a search for work can be tested, and I therefore accept it.

Upon the foregoing findings and conclusions, and the entire record in this case, I hereby issue the following recommended:

ORDER⁶

The Respondent, Cumberland Farms Dairy of New York, Inc., Canton, Massachusetts, its officers, agents, successors, and assigns, shall make Lance Giles whole by payment to him in the sum of \$20,966.88 together with interest to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).⁷ There shall be deducted therefrom social security taxes, income tax withholding and such other deductions as may be required by the laws of the United States or the State of New York.

⁴ *Inland Empire Meat Company*, 255 NLRB 1306, 1308 (1981).

⁵ Indirect support was given to the proposition that jobs were not available by the testimony of the local Teamsters organizer even though his actual knowledge was limited to the unionized segment of the industry.

⁶ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁷ See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

SCHEDULE "A"

<i>Yr/Qtr</i>	<i>Gross Backpay</i>	<i>Net Interim Earnings</i>	<i>Net Backpay</i>
1980/2	\$1,393.06	0	\$1,393.06
1980/3	4,551.42	0	4,551.42
1980/4	4,010.72	0	4,010.72
1981/1	4,955.46	0	4,955.46
1981/2	4,731.91	0	4,731.91
1981/3	1,326.31	0	1,326.31
Total			\$20,968.88